

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

TORCH ELECTRONICS, LLC, et al.,)

Plaintiffs,)

v.)

Case No. 21AC-CC00044

THE MISSOURI DEPARTMENT OF)
PUBLIC SAFETY, et al.,)

Defendants,)

and)

MISSOURI GAMING ASSOCIATION,)

Intervenor/Defendant/)
Counter-Claim Plaintiff.)

DEFENDANTS THE MISSOURI DEPARTMENT OF PUBLIC SAFETY
AND THE MISSOURI STATE HIGHWAY PATROL'S TRIAL BRIEF

AND

RENEWED MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED
PETITION

COME NOW Defendants The Missouri State Highway Patrol and the Missouri Department of Public Safety (hereinafter collectively referred to as MSHP/DPS), by and through their attorney, Scott R. Pool, and hereby respectfully submit to this Court their Trial Brief and Renewed Motion To Dismiss. For their cause, MSHP/DPS respectfully state:

Introduction

The Missouri State Highway Patrol (MSHP) is a law enforcement agency. The mission of the MSHP is to serve and protect all people by enforcing laws and providing services to ensure a safe and secure environment. By excelling as a criminal justice leader in the delivery of quality services, the MSHP will ensure Missouri is a safe place to live and visit.

The MSHP is a nationally recognized, internationally accredited, full-service law enforcement agency. The DPS comprises seven different agencies (including two Commissions) and six separate programs, all committed to ensuring the safety of the citizens of Missouri.

Despite a legacy of decades of training, leadership and results in the field of law enforcement, Plaintiffs, Torch Electronics, LLC (a vendor who distributes electronic gaming devices) and Warrenton Oil Co., LLC (a company principally engaged in the business of operating convenience stores), bring this suit seeking to direct how MSHP/DPS may perform its police powers and law enforcement duties. (Hereinafter, Torch Electronics, LLC, and Warrenton Oil Co., LLC, will be collectively referred to as “Torch.”)

Specifically, Torch seeks to prohibit MSHP/DPS from carrying out investigation(s) of complaints it receives regarding the commission of a potential crime should it relate to devices owned or placed into commerce by

Torch. MSHP/DPS routinely performs basic law enforcement functions following receipt of a complaint, including investigation. Depending upon that investigative result, a referral may be made to a prosecutor of competent jurisdiction.

That prosecutor in turn may elect to file criminal charges before an associate or circuit court. If charges are filed, that prosecutor will have the burden to prove the allegations beyond a reasonable doubt.

This lawsuit seeks to interfere, circumvent, and prohibit MSHP/DPS, county prosecutors, and judges from performing their constitutional and statutory duties if the subject matter involves Torch.

Brazenly, Torch wants this Court to declare and enjoin MSHP/DPS from its law enforcement duties with respect to electronic gaming devices that are illegal. Specifically, Torch wants this Court to enter its judgment declaring all of Torch's various and many devices/games to be legal (despite prior conclusions directly to the contrary by the Circuit Court of Platte County, the Missouri Lottery, the Missouri Alcohol and Tobacco Commission, and the Missouri Gaming Commission, in addition to decisions from other jurisdictions made by state courts and related governmental entities).

This lawsuit has many fatal flaws: (1) the devices are illegal however, before even reaching the issue of illegality; (2) this Court lacks the inherent authority to prospectively direct law enforcement agencies over how to

exercise its police powers; (3) the request to enter a judgment over the meaning and whether a gaming device falls within or outside certain criminal statutes, is an improper use of the declaratory judgment act; and (4) Torch has available remedies at law and cannot show an irreparable injury.

For instance, while Torch is not a defendant in any criminal matter, cases involving Torch devices are being defended by counsel. The prosecuting attorneys in any case will be required to prove it beyond a reasonable doubt. Further, Torch has can demonstrate no harm. Torch's profits have increased every year since the date of the first conduct Torch so complains by MSHP/DPS.

It is not the function of this court to prospectively direct MSHP/DPS in how and over what it may do in carrying out its police powers. Most certainly, it is not the role of Torch, a private for profit business, to interfere, direct, and control MSHP/DPS with respect as to how Torch is treated; especially over games in which the vast consensus has found illegal.

While Torch is afforded due process and other rights and remedies available under the law, under the United States Constitution, Missouri Constitution, and statutes, it is not entitled to a prospective declaration by this Court and an order restraining MSHP/DPS from carrying out their investigatory duties and inherent responsibilities.

I. Declaratory judgment is not proper.

Setting aside that law enforcement properly exercised the police power of the state, Torch seeks relief that this Court cannot provide. This Court cannot issue a declaratory judgment regarding § 572.010, RSMo., for three fundamental reasons: 1) criminal statutes are outside the scope of the declaratory judgment act; 2) the issue is not ripe; and 3) Torch has an adequate remedy at law.

A. Criminal statutes are not subject to the declaratory judgment act.

There are two primary reasons why criminal statutes are not subject to the declaratory judgment act. First, criminal statutes are outside the scope of the act. Second, by their nature, criminal statutes must be plain on their face, which renders the need for a court's declaration unnecessary.

The scope of the declaratory judgment act includes:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Section 527.020, RSMo.

Missouri courts have held that this scope does not encompass interpretations of criminal laws. “[A]n interpretation of the rights of the

litigants in this case is not authorized by the declaratory judgment act. The conflict of interest statute is criminal in nature, not civil.” *Cottleville Community Fire Protection Dist. v. Morak*, 897 S.W.2d 647, 648 (Mo. App. E.D. 1995).

Section 572.010 RSMo., which provides the definitions for the statute that prohibits gambling, is a criminal law. *See Thole v. Westfall*, 682 S.W.2d 33 (Mo. App. E.D. 1984). Further, section 572.010 is part of Missouri’s Revised Criminal Code. § 556.011. As such, it is not subject to the declaratory judgment act.

Additionally and fundamentally, criminal statutes must be plain on their face to ensure the public is informed of the prohibition. Such plain language obviates the need for a court’s declaration as to its meaning.

A criminal statute must be sufficiently clear on its face to inform the public what is defined as criminal conduct. There is no need for a circuit judge to utilize the declaratory judgment statute to interpret the meaning of a criminal statute. Moreover, a civil judgment would not be binding upon the state. It would therefore be legally meaningless.

Morak, 897 S.W.2d at 649.

Section 572.010 RSMo. is a criminal statute. *See Thole*, 682 S.W.2d 33 & §556.011. As such, it is legally presumed to be sufficiently clear on its face and outside the scope of the declaratory judgment act. Therefore, Torch has failed to state a claim upon which relief can be granted, and this Court must dismiss Torch’s petition.

B. Torch's claims do not meet the elements for declaratory judgment.

Even if the meaning of criminal statutes could be declared by the Court, Torch still cannot meet the elements necessary for the Court to issue declaratory judgment. In order for declaratory judgment to issue, Torch must present to the Court:

(1) a justiciable controversy that presents a real, substantial, presently existing controversy admitting of specific relief, as distinguished from an advisory decree upon a purely hypothetical situation; (2) a plaintiff with a legally protectable interest at stake, consisting of a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief; (3) ***a controversy ripe for judicial determination***; and (4) ***an inadequate remedy at law***.

Schaefer v. Koster, 342 S.W.3d 299, 300 (Mo. banc 2011) (emphasis added). In this instance, Torch cannot simultaneously demonstrate that the matter is ripe and that there is no adequate remedy at law. The matter can only be ripe if Torch is charged under the gambling statute, which they have not pled. However, if they are charged, they can raise as a defense that they do not believe the law is applicable to them, which is an adequate remedy.

1. Torch's claims are not ripe.

Torch has not pled that they have been charged under the criminal gambling statute. Until such charges are filed, their claims are not ripe. "There must be a sufficiently complete state of facts presenting issues ripe for

determination before a court may declare the law. ‘A mere difference of opinion or disagreement or argument on a legal question affords inadequate ground for invoking the judicial power.’” *City of Joplin v. Jasper Cnty.*, 161 S.W.2d 411, 413 (Mo. 1942).

Torch has not pled that they have been charged with a crime. Indeed, such charges may never be filed or a prosecutor may ultimately drop filed charges. *See State v. Honeycutt*, 96 S.W.3d 85, 89 (Mo. banc 2003) (holding that “a prosecutor has broad discretion to determine when, if, and how criminal laws are to be enforced.”). Until criminal charges are filed, there cannot be a sufficiently complete state of facts such that a matter would be ripe. Then, as discussed next, if charges were filed, Torch would have an adequate remedy.

2. Torch has an adequate remedy at law.

If a criminal case is brought, Torch can raise as a defense that the criminal statute should not apply to them; therefore, Torch has an adequate remedy. When there is an adequate remedy already available, the trial court does not abuse its discretion in dismissing declaratory judgment claims. *State ex rel. Small v. Harrah’s North Kansas City Corp.*, 24 S.W.3d 60, 67 (Mo. App. W.D. 2000).

Whether or not their argument as to the applicability of the prohibition against gambling is correct, their defense that a criminal statute should not be applicable in any potential criminal prosecution is an adequate remedy.

Beyond being plainly self-evident, case law supports the proposition that Torch has an adequate remedy through their criminal defense, which renders a declaratory judgment improper.

[T]he trial court properly exercised its discretion to dismiss plaintiffs' declaratory judgment petition because each plaintiff had an adequate remedy at law. When plaintiffs filed their declaratory judgment petition, each had the option of raising as a defense the alleged unconstitutionality of HB 1715 and section 577.023 [the statute addressing aggravated, chronic, persistent and prior boating while intoxicated offenders].

Schaefer, 342 S.W.3d at 300. As with *Schaefer*, it is appropriate to dismiss this declaratory judgment action because Torch has an adequate remedy through their defense of any criminal charges brought.

Declaratory judgment is not proper because the Court does not have jurisdiction to declare the meaning of criminal statutes; Torch's claims are not ripe; and Torch has an adequate remedy. Therefore, Torch has failed to state a claim upon which relief can be granted, and this Court must dismiss Torch's petition.

II. Injunctive relief is not proper.

This Court also cannot provide the injunctive relief Torch seeks for three fundamental reasons: 1) the Court is without jurisdiction to do so; 2)

Torch continues to have an adequate remedy at law; and 3) there is no irreparable harm.

A. MSHP/DPS law enforcement actions are legitimate.

Notwithstanding Torch's allegations, the actions of Defendants are entirely lawful. Torch has not pled and cannot demonstrate a violation of their Fourth Amendment rights when law enforcement is simply in the public area of a commercial property, such as a gas station or a bookstore. *Maryland v. Macon*, 472 U.S. 463, 469 (1985).

Torch has not pled and cannot demonstrate a violation of their Fourth Amendment rights when law enforcement chats with anyone, including Torch's employees or agents, in a non-custodial setting. *Florida v. Royer*, 460 U.S. 491, 497-98 (1983); *I.N.S. v. Delgado*, 466 U.S.210, 216 (1984).

Torch has not pled and cannot demonstrate a violation of their Fourth Amendment rights when law enforcement views something that may be a crime or an instrumentality of a crime that is in "plain sight." *Macon*, 472 U.S. at 469. *See also Florida v. Riley*, 488 U.S. 445 (1989) (holding that the Fourth Amendment does not require the police traveling the public airways to obtain a warrant to observe what is visible to the naked eye).

Torch has not pled and cannot demonstrate a violation of their Fourth Amendment rights when law enforcement, via a court-issued warrant, seizes instrumentalities evidencing a potential crime.

Torch has not pled and cannot demonstrate a violation of their Fourth Amendment rights when law enforcement, via probable cause, seizes objects in plain view where their incriminating character is immediately apparent. *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993).

Each act that Torch complains about is lawful and incident to the police power of the state to address potentially criminal conduct. Further, Torch's allegations fall squarely within the Highway Patrol's statutory responsibility to investigate any suspected crime or criminal activity within the state. §§43.025 & 43.380.

B. The Court is without jurisdiction to enjoin the police powers of the state.

Torch has not pled and cannot show an exception to the general rule that courts do not have jurisdiction to equitably interfere with the police powers of the state. "Generally a court of equity is without jurisdiction to interfere with the enforcement of the criminal law." *State ex rel. Eagleton v. McQueen*, 378 S.W.2d 449, 453 (Mo. banc 1964). "It is only in exceptional cases that a court of equity is authorized to interfere in criminal prosecutions." *Sampson Distrib. Co. v. Cherry*, 156 S.W.2d 596, 597 (Mo. 1941).

In that case, Appellant sought to enjoin the State Inspector of Oils and Motor Fuels and officials of the city of St. Louis from arresting and

prosecuting agents of the corporation, which was operating without a license to distribute motor fuels. *Id.*

The Supreme Court of Missouri held that Appellant had failed to state facts upon which a court of equity could justify enjoining a criminal prosecution. *Id.* The Supreme Court held that even if the Appellant had complied with the law in applying for a license, "it does not necessarily follow that appellant had the right to engage in business without first securing a license." *Id.* If the State Inspector had arbitrarily refused to issue a license, Appellant had an adequate remedy open to it because it could invoke a writ of mandamus to compel issuance of a license. *Id.*

This general rule derives from the foundational concept that discretionary acts, as opposed to ministerial acts, are not subject to injunction.

As a fundamental proposition of law, a court of equity will not interfere with the exercise of the discretionary powers vested of necessity in a municipal corporation, or its officers, provided the limits of those powers are not overstepped, and absent a showing of fraud, malice, bad faith, or improper motives, for to hold otherwise would be to offend against the basic constitutional provisions dividing our system of government into three separate, distinct, and largely independent branches, by permitting the judicial branch to assume to itself the right to exercise the powers delegated expressly or by implication to the executive department.

Russo v. Miller, 3 S.W.2d 266, 268 (Mo. App. St.L. 1928). Further, policing is inherently discretionary rather than ministerial and not subject to

equitable remedies. Where the provision of law in question involves a determination of facts or some combination of law and facts as to whether or not something should be done, then the act is discretionary not ministerial. *Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo. App. W.D. 1998).

“Thus, it logically follows that police officers may not be enjoined from the performance of their proper duties in connection with the exercise of the general police power, and this is true even though their acts may be performed in an offensive, oppressive or unlawful manner.” *Russo*, 3 S.W.2d at 268. “Where the law thus casts both a right and a duty upon an officer or a branch of the government which involves the exercise of discretion, the officer's conduct with respect to that duty or discretion is no more to be controlled by injunction than by mandamus.” *Kearney v. Laird*, 144 S.W. 904, 906 (Mo. App. St.L. 1912).

The exception to the rule that injunctions are not appropriate for the enforcement of criminal law requires meeting both elements of a two-part test:

- 1) the criminal law at issue must be unconstitutional; and
- 2) there is irreparable harm.

[A]n exception to the general rule exists where the criminal law in question is unconstitutional or otherwise invalid and the attempted enforcement would constitute a direct invasion of property rights resulting in irreparable injury. The two elements of statutory invalidity and irreparable injury must

both be present and clearly appear in order for the exception to be effective.

McQueen, 378 S.W.2d at 453–54 (internal citations omitted). The exception to the rule is narrow, and Torch’s pleadings do not meet the exception.

Torch has averred that law enforcement is improperly applying the criminal law as it relates to them; they have not pled that the law is unconstitutional. Additionally, Torch does not have irreparable harm, which will be discussed in further detail below.

Nothing within Torch’s pleadings indicate that Defendants are acting in anything other than their discretionary capacities as the police power of the state. Further, Torch’s pleadings do not meet the narrow exception to this rule. Therefore, this Court does not have jurisdiction to grant the injunctive relief Torch seeks, and the petition must be dismissed.

C. Injunction is improper because Torch has an adequate remedy at law.

Torch has adequate remedies at law either through their defense in a criminal prosecution; a §1983 action; motion to suppress; and/or writ of replevin. Therefore, injunctive relief is not appropriate.

The primary purpose of an injunction is to preserve the status quo and prevent irreparable injury to the plaintiff pending disposition of the case on the merits. An injunction is an extraordinary and harsh remedy and should not be employed where there is an adequate remedy at law. ***In order to show entitlement to injunctive relief, the petition must affirmatively show on its***

face by the facts pleaded that (1) the plaintiff has no adequate and complete remedy at law, and (2) irreparable harm will be done if the status quo is not maintained.

Walker v. Hanke, 992 S.W.2d 925, 933 (Mo. App. W.D. 1999) (emphasis added) (internal citations omitted).

“The term ‘adequate remedy at law’ generally means that damages will not adequately compensate the plaintiff for the injury or threatened injury, or that the plaintiff would be faced with a multiplicity of suits at law.” *Id.*

Torch has not pleaded that they face a “multiplicity of suits at law,” rather, its issue is that they may face multiple criminal prosecutions throughout the state because their actions have occurred throughout the state. One cannot complain of defending multiple criminal suits across the state when one has potentially committed multiple crimes across the state.

One final “reason why a court of equity is strongly reluctant to interfere with the performance of police duties, even though carried on unlawfully, and that is that the complaining citizen ordinarily has an adequate remedy at law, either by an action for damages, or by a criminal prosecution.” *Russo*, 3 S.W.2d at 269.

It is clear that Torch has an adequate remedy because they can raise their allegations as to the inapplicability of the statute to their machines as a defense in a criminal suit. Torch also has the option to raise through a §1983

suit any Fourth Amendment violations that they believe the Defendants committed. *See generally Graham v. Connor*, 490 U.S. 386, 393-95 (1989).

If they can prevail on their §1983 claims, damages can be awarded. In addition to moving to suppress the evidence or by replevin, because Torch has an adequate remedy in law civilly or through criminal prosecution, injunctive relief is not proper, and the Court must dismiss Torch's petition.

D. Injunctive Relief is not proper because Torch has suffered no injury and/or irreparable harm.

Torch does not have an irreparable injury. It has suffered no financial or reputational harm. Its business has grown each year, as has its revenues. It maintains its business partners and enters into new partnerships. Plaintiff must demonstrate "irreparable harm will be done if the status quo is not maintained." *Walker*, 992 S.W.2d at 933. "Irreparable harm is established if monetary remedies cannot provide adequate compensation for improper conduct." *Id.*

A mere allegation that irreparable injury will ensue is insufficient. "Traversable facts must be stated in the bill, which show that plaintiffs cannot have an adequate remedy at law, or that the injury cannot be compensated by an action for damages as such." *State ex rel. Kenamore v. Wood*, 56 S.W. 474, 477 (Mo. 1900).

In this instance, Torch can point to no injury, or irreparable harm, which an injunction can only remedy. This case has been pending for years; the duration of this suit alone is sufficient to demonstrate that injunctive relief is not appropriate.


Torch may make conclusory claims that there is irreparable harm due to Defendants' law enforcement actions. Additionally, Torch makes unsupported and conclusory claims that the lawful seizure of the machines will result in reputational damage, which they also conclude is an irreparable harm. Torch acted with knowledge that these devices were unsettled under Missouri law when it began this enterprise. In fact, Torch uses the term "Grey Machine" to impart a question of whether the devise is legal/illegal. Every pronouncement by a governmental entity since at least 2019 has been these devices are illegal.

Injunctive relief is not a remedy for a difference of opinion, especially when the opinion of the State of Missouri and MSHP/DPS has remained consistent: these devices are illegal gambling devices.

WHEREFORE, the Missouri State Highway and the Missouri Department of Public Safety respectfully request this Court to deny and dismiss Torch Electronics, LLC, and Warrenton Oil Co., LLC's claims for declaratory judgment and injunctive relief; for their costs; and for any and all relief this Court may deem just and proper.

Respectfully submitted,

GIBBS POOL AND TURNER, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served via electronic filing on September 22, 2023, to:

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